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DATE: March 9, 1999

CASE NO: 1998-ERA-37

In the Matter of

MARK GRAF,
Complainant,

v.

WACKENHUT SERVICES LLC,
Respondent.

ORDER GRANTING MOTION TO COMPEL

This case arises under the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851, and the regulations promulgated thereunder at 29 C.F.R. Part 24. A formal hearing is currently scheduled before the undersigned administrative law judge on April 5, 1999 in Denver, Colorado. The Pre-Hearing Order sets forth numerous deadlines to facilitate the hearing of this matter.

On March 1, 1999, this office received Complainant's "Objection to Respondent's Notice of Deposition and Subpoena of Mark Graf." Therein, Complainant objected to the notice of deposition and the subpoena duces tecum, which were served by Respondent on February 24, 1999, and notified the court that he would not be appearing at a March 2, 1999 deposition.

On March 3, 1999, Respondent filed a "Response to Complainant's Objection to Graf Deposition and Motion to Compel." Therein, Respondent states that Complainant's

deposition has been rescheduled for March 12, 1999, and that a corresponding subpoena duces tecum has been issued. Respondent moves the court to compel Complainant to attend the deposition and produce the requested documents.

Based on Complainant's desire to proceed to a formal hearing as expeditiously as possible, the undersigned issued an Order to Show Cause on March 3, 1999. Therein, Complainant was ordered to show cause why he would be unable to comply with Respondent's subpoena duces tecum on March 12, 1999.

On March 8, 1999, Complainant filed a "Response to Order to Show Cause and Wackenhut's Motion to Compel" and an accompanying attorney declaration. Therein, Complainant renews his objection to the second deposition, which is currently scheduled for March 12, 1999. Moreover, Complainant argues that a subpoena duces tecum is an inappropriate method for obtaining documents from a party. Complainant also objects to the scope of Respondent's request.

DISCUSSION

Title 29 of the Code of Federal Regulations sets forth Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges. *See* 29 C.F.R. Part 18. The Federal Rules of Civil Procedure apply to situations not provided for or controlled by these rules, or by a rule of special application. 29 C.F.R. § 18.1(a).

[Page 3]

A. DEPOSITION OF COMPLAINANT

On March 3, 1999, Respondent moved this court to compel Complainant to attend a second deposition in this matter. Complainant vigorously objects to a second deposition on the following grounds: 1) discovery has been cutoff; 2) Complainant has already been deposed once; 3) Respondent has failed to seek leave of the court; and 4) Complainant has not received proper notice.[1] Complainant was deposed on January 11, 1999. Respondent sought to depose Complainant "for a second time" on March 2, 1999. Complainant filed an objection with the court on March 1, 1999 and refused to appear at said deposition.

Respondent served Complainant with a Second Notice of Continued Deposition on March 3, 1999. The deposition is currently scheduled to be held on March 12, 1999. Respondent seeks to depose Complainant about the about the "24 audiotapes containing approximately 100-150 separate conversations which Complainant and/or his friend, Jeff Peters, secretly recorded." On March 8, 1999, Complainant renewed his objection to a second deposition. Respondent moves the court to compel Complainant to attend the deposition on March 12, 1999.

Discovery Cut-Off and Leave of the Court

Complainant asserts that notice of the deposition is invalid because "it was served after the discovery cutoff." Moreover, Complainant argues that notice of the deposition "was filed without first seeking permission by the Court to conduct a post-discovery continued deposition."

However, on February 22, 1999, I issued an Order Granting 30-Day Continuance in this matter. Therein, I revised the pre-hearing deadlines and stated that all discovery shall be completed no later than Friday, March 26, 1999. Since I did not limit the scope of discovery, "the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter of this proceeding." See 29 C.F.R. § 18.14. Contrary to Complainant's assertions, the March 26, 1999 discovery deadline does not preclude Respondent from taking Complainant's deposition.

Complainant Has Already Been Deposed

Complainant also argues that he "was extensively deposed in a previous meeting that lasted a full-day, and concluded without any request by [R]espondent to continue the deposition." Complainant was deposed by Respondent on January 11, 1999. Since then, Complainant has produced 24 audiotapes containing numerous conversations. Respondent argues that "to receive a fair hearing, it is essential that Wackenhut be given the opportunity to depose Complainant about these tapes and the subject matter within them." Complainant asserts that "Respondent has had notice of the existence of Complainant's audio tapes since December 24, 1998," and that "Respondent did not request copies of any audio tapes until after the deposition occurred." As such, Complainant contends that Respondent essentially waived its right to depose Complainant about the contents of said tapes. Complainant's argument is not persuasive.

Section 18.13 of the Rules of Practice and Procedure expressly provides that:

> Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or other evidence for inspection and other purposes; and requests for admission. Unless the administrative law judge orders otherwise, *the frequency or sequence of these methods is not limited*.

29 C.F.R. § 18.13 (emphasis added). Therefore, Respondent is not precluded from deposing Complainant about the audio tapes and the subject matter within them. Moreover, counsel for both parties admit that the process of copying, and at times recopying, the 24 audio tapes has taken a long time. Indeed, Complainant's counsel admits that due to recording problems, some copies of said tapes will not be delivered to Respondent until later this week. As such, it is unlikely that Respondent's counsel would

have been prepared to question Complainant about the contents of said tapes even if he had requested them on December 24, 1998.

[Page 4]

Based on the foregoing, Respondent's motion to compel Complainant to attend the deposition scheduled for March 12, 1999 is hereby **GRANTED**.

B. SUBPOENA DUCES TECUM

On February 24, 1999, Complainant was served with a subpoena duces tecum. On March 1, 1999, Complainant objected to the subpoena duces tecum. As such, Respondent served Complainant with a second subpoena duces tecum on March 3, 1999 and moved the court to compel Complainant to comply with the discovery request.

Complainant argues that a subpoena duces tecum is an inappropriate method for obtaining documents from a party. Complainant also objects to the scope of Respondent's request.

Rules Governing Subpoenas Duces Tecum

Section 18.24 of the Rules of Practice and Procedure provides in part:

> [T]he Chief Administrative Law Judge or the presiding administrative law judge, as appropriate, may issue subpoenas as authorized by statute or law upon written application of a party requiring attendance of witnesses *and production of relevant papers, books, documents, or tangible things in their possession and under their control*.

29 C.F.R. § 18.24(a) (emphasis added). Section 18.24 permits party and nonparty witnesses to be served with subpoenas duces tecum. *Cf. Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708, 717 (E.D.P.A. 1968)(Fed. R. Civ. P. 34 permits both party and nonparty witnesses to be served with subpoenas duces tecum). In contrast, Section 18.19 applies only to parties. *See* 29 C.F.R. § 18.19.

Because a party has the option of proceeding under either Section 18.24 or Section 18.19 in compelling the production of documents by opposing party at the taking of a pre-hearing deposition, Section 18.24 must be construed *in pari materia*[2] with Section 18.19. *Cf. Tiedman v. American Pigment Corp.,* 253 F.2d 803, 808 (4th Cir. 1958)(Fed. R. Civ. P. 34 is *in pari material* with Fed. R. Civ. P. 45); *Cooney*, 288 F. Supp. at 717. As such, the specific terms of Section 18.19 should govern the general terms of Section 18.24 in determining the proper scope of a subpoena duces tecum and the period of time in which a party has to respond to a subpoena duces tecum. *Cf. Cooney*, 288 F. Supp. at 717.

Scope of Subpoena Duces Tecum

Complainant argues that "[t]he scope of Respondent's Motion to Compel is clearly overbroad, and Complainant accordingly objects to an Order requiring Complainant to produce documents or tapes not in his control." Respondent has requested that Complainant produce:

> Each and every tape (audio, video or any other means) of any conversations or statements or other matters relating to Wackenhut Services, LLC, Rocky Flats or any related topic which you have in your control or possession. This would include, but is not limited to, tapes made by you *and/or Jeff Peters.*

(emphasis added by Complainant). Complainant asserts that this request is an "attempt[] to compel Complainant to produce documents not in his control."

This objection has no merit. Respondent has already limited his request to tapes which are in the "control or possession" of Complainant. Moreover, it is possible that Complainant could have additional tapes, which were *made by* Mr. Peters, within his possession, custody or control. As such, Complainant's objection as to the scope of this request is hereby denied.

Time Period to Respond

Section 18.19 provides, "[t]he party upon whom the request is served shall serve on the party submitting the request a written response within thirty (30) days after service of the request." Therefore, a party generally has 30 days in which to respond to a subpoena duces tecum. Nevertheless, Section 18.1(b) provides:

> Upon notice to all parties, the administrative law judge may, with respect to matters pending before him or her, modify or waive any rule herein upon a determination that no party will be prejudiced and that the ends of justice will be served thereby.

29 C.F.R. § 18.1(b).

In this case, Respondent argues that it will have insufficient time to prepare for trial if Complainant requires 30 days to respond to the subpoena duces tecum. In a signed declaration, Complainant's counsel states that due to problems with the recording process, copies of some tapes made available to Respondent in response to its First Set of Requests for Production should be delivered to Respondent this week. In addition, counsel states that a copy of an electronic audio recording was sent to Respondent's counsel, via e-mail, on March 8, 1999. "The only other tape in [Complainant's] possession is a video recording of the CBS Nightly News broadcast of November 24 and

25, 1997." Complainant's counsel states that "[c]opies of the transcript of this tape were provided to Respondent in Complainant's production responses," and that she is willing to arrange for reproduction of this video tape upon Respondent's request.

[Page 6]

Based on the foregoing, I find that neither party will be prejudiced if the 30 day time period for responding to this request is modified. Moreover, Complainant states that he "has no objection to either responding in a shorter time period to Respondent's Requests for Production or providing assurance that all tapes in [his] control have been produced to Respondent." I also find that the interests of justice are served by modifying this time period. Complainant has repeatedly expressed the desire to proceed to a formal hearing as expeditiously as possible. Modifying the 30 day time period will help avoid further delays and requests for continuance in this matter. As such, Complainant is **ORDERED** to respond to the above-mentioned subpoena duces tecum on March 12, 1999.

With respect to Respondent's Motion to Compel Complainant to produce the above-mentioned tapes by March 12, 1999, such a motion no longer appears to be necessary. Nevertheless, it is expected that Complainant will cooperate fully in answering this request and all future discovery requests in this matter. Due to the time constraints for completing discovery, Complainant's cooperation is essential to avoid further continuances.

ORDER

IT IS HEREBY ORDERED that:

1. Respondent's Motion to Compel Complainant to appear for deposition on March 12, 1999 is **GRANTED**.
2. The time period for responding to the above-mentioned subpoena duces tecum is **MODIFIED**. Complainant is **ORDERED** to respond to the above-mentioned subpoena duces tecum on March 12, 1999.
3. Respondent's Motion to Compel Complainant to produce the above-mentioned tapes is **DENIED** because such a motion no longer appears necessary, but it may be renewed upon Complainant's noncompliance with this Order.

Entered this 10th day of March, 1999, at Long Beach, California.

DANIEL L. STEWART
Administrative Law Judge

DLS: cdk

[ENDNOTES]

[1]Complainant argues that he did not receive 5 days written notice of when the deposition was to be taken. Subsequent to Complainant's refusal to be deposed on March 2, 1999, Respondent issued a revised Notice of Continued Deposition of Complainant for March 12, 1999, which satisfied the 5 day rule set forth at 29 C.F.R. § 18.22(c). As such, this issue is moot.

[2]"Statutes *in pari materia* are to be construed together." *Black's Law Dictionary* 898 (4th ed. 1951) (citation omitted).